

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

74-2267

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

OSWALDO LONDONO-ECHEVERRY

Appellant.

Docket No. 74-2267

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT OF
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007

WILLIAM EPSTEIN
Of Counsel

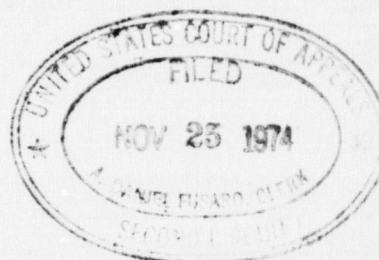


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 OSWALDO LONDONO-ECHEVERRY :
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ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

Whether it was plain error for the trial judge to fail to instruct the jury on appellant's theory of the case.

STATEMENT PURSUANT TO RULE 28(3)

PRELIMINARY STATEMENT

This is an appeal from a judgment of the United States District Court for the Eastern District of New York (the Honorable Mark A. Costantino) rendered on September 20, 1974 after a jury trial convicting Oswaldo Londono-Echeverry of one count of possession with intent to distribute and one count of distribution of 1/8 kilogram cocaine, each count in violation of 21 U.S.C. §841(a)(1); 18 U.S.C. §2.

Appellant was sentenced to incarceration for a period of four years on each count, the sentences to run concurrently, to a six year term of special parole, and to deportation upon completion of his prison term.

The Legal Aid Society, Federal Defender Services Unit was continued as counsel on appeal, pursuant to the Criminal Justice Act.

STATEMENT OF FACTS

Appellant, with co-defendant Reynaldo Santiago-Lugo (Santiago), was charged with participation in one sale of 1/8 kilogram of cocaine to an undercover agent. Prior to trial, Santiago pleaded guilty.

The principal evidence at trial against appellant was given by a paid Government informer, Anibel Romeo, who related that on January 24, 1974, in Queens, Santiago offered to sell 1/4 kilogram of cocaine for \$8,000 (25-29*). Santiago then called Agent Michael Gray of the Drug Enforcement Administration, who told Santiago to set up a meeting for January 28th (30-32). On that date, Gray met with Romeo, who was fitted with a belt transmitter, and met Santiago. (33). Santiago did not have the cocaine, claiming that he was still looking for his contact (35.) Santiago and Romeo then spent 25 minutes searching the neighborhood for the contact, to no avail (36). Back at Gray's car, Santiago promised that he would return in one hour with his contact (38-39).

Thereafter, Romeo related that at 10 o'clock p.m., while in Gray's car, he observed Santiago approaching in a white car driven by another man, later identified as appellant (72). Romeo testified that he and Gray entered appellant's car, and that he, Gray, Santiago, and appellant discussed the cocaine deal. (74) A deal was discussed for the 1/8 kilogram, primarily between

* Numerals in parenthesis refer to pages of the trial transcript.

Romeo and Santiago (76). According to Romeo's testimony, appellant's participation consisted of some discussion of the price and of the statement that he, appellant, could get another 1/8 kilogram later that night or the following day (77). After settling on the price, Romeo, Santiago, and Gray returned to Gray's car, ostensibly to complete the sale (79). At Gray's car, Santiago was arrested (80). Appellant, who had remained at his car, was also arrested (80). At this point, the tape of the conversation that took place in the car among Romeo, Santiago, Gray, and appellant was played for the jury (Government Exhibit 3) and the transcripts of the conversations distributed (Government Exhibit 4) (84-99).* The identification of appellant's voice was made by Romeo, who assisted in the translation and transcription of the tape.**

Also testifying for the Government was Agent Gray, who substantially corroborated Romeo's rendition of the facts (188-245).

Following the introduction by stipulation of the chemist's report, the Government rested (248-250).

* The transcripts are annexed as "D" to the appellant's separate appendix.

** It is Romeo's identification of appellant's voice that is challenged on appeal.

Santiago was the first defense witness. He related that appellant had been only an acquaintance from the neighborhood, whom he had seen only about four times prior to the night in question, when at 9:50 p.m., having already met his contact, he sighted appellant, who was parking his car near a restaurant (259-265). According to Santiago, he asked appellant to give him a ride to a brief meeting, but did not tell appellant the purpose of the meeting (265). Santiago testified that at the meeting in appellant's car, appellant had no part in the deal and spoke no words other than to say that he wished to leave (266-360). He lastly said that he had told the United States Attorney's office that appellant was innocent (368).

Appellant, a 28-year old Columbian working illegally in the United States for five years, testified extensively on his own behalf (371-375). He corroborated Santiago's testimony of their slight acquaintance, of their chance meeting at 9:45 p.m. on the night in question, and of his total noninvolvement with the transaction (377-382). Appellant related that he had said none of the words attributed to him on the tape and transcript (383-467) (Government Exhibits 3 and 4).

Following appellant's testimony the defense rested. The Government then brought forward a rebuttal witness, Agent Kiernan Kobell of the Drug Enforcement Administration, who had acted in a surveillance capacity on the night of the sale (481-485). Kobell testified that, rather than appellant and Santiago having met by chance at 9:45 p.m., Santiago, upon leaving Romeo and Gray at 9:00 p.m., went to a bar where at 9:30 p.m. appellant arrived (485-486). He further related that shortly before 10:00 p.m. appellant and Santiago exited from the bar together and proceeded in appellant's car to the meeting (486-491).

In her summation to the jury, defense counsel argued the theory that appellant had not said the words attributed to him by Romeo on the tape and transcription:

" . . . Now, the stipulation was that this is an accurate translation, and I submit to you that it probably is an accurate translation. What it is saying here in Spanish, I assume that the translation from Spanish to English is correct. But what I dispute is that the person whose name is put next to each of those statements is in all instances correct."

(525-526).

Counsel did not, however, request the Judge to charge the jury that this was the defense theory of the case, and so such charge was given.

ARGUMENT

IT WAS ERROR FOR THE TRIAL
JUDGE TO FAIL TO INSTRUCT THE JURY
ON APPELLANT'S THEORY OF THE CASE.

The Government sought to prove appellant's role in the cocaine sale by introducing into evidence a tape of a conversation among Romeo, the informer, Gray, the undercover agent, Santiago, the co-defendant, and appellant, and a transcription made of the tape. According to the Government, these two pieces of evidence demonstrated that appellant was a party to the sale. The identification of the speakers on the tape was made by Romeo, who testified that certain sentences were stated by appellant. The transcript of the conversation was given to the jury with appellant's initials next to those sentences. (See Appendix D to appellant's brief.) These initials were placed there due to Romeo's identification during preparation of the transcripts.

Both appellant and Santiago testified, however, that Santiago had uttered all of the incriminating words attributed to appellant and that appellant was unaware of the purpose of the meeting among Romeo, Gray, and Santiago.

In her closing argument, defense counsel argued that the Government had erroneously attributed to appellant the incriminating sentences on the tape and transcription of the conversation:

" . . . Now, the stipulation was that this is an accurate translation, and I submit to you that it probably is an accurate translation. What it is saying here in Spanish, I assume that the translation from Spanish to English is correct. But what I dispute is that the person whose name is put next to each of those statement is in all instances correct.

(525-526).

This theory of the defense thus raised the primary factual issue in the case for the jury to determine.

In his instructions to the jury, Judge Costantino failed to make any reference to the defense theory of the case. Although counsel did not propose an instruction on the defense theory of the case, and although counsel failed to make any objections following the charge, it was plain error, pursuant to Rule 52(b) of the Federal Rules of Criminal Procedure, for the Judge to omit this crucial element from the charge (cf. United States v. Weiler, 458 F.2d. 474 (3rd Cir. 1972)).

The need to charge the jurors that it was they who had to find that appellant made the statements attributed to

him by the Government, and that the transcript itself was of no independent probative value, was critical in this case. Without such an instruction, the jury could well have regarded the transcript, which included a notation that appellant made certain of the damaging statements, as conclusive. See United States v. Blaine, 375 F.2d 249, 252 (6th Cir. 1967); United States v. Blount, 229 F. 2d 669, 673 (2d. Cir. 1956).

Thus, it was plain error for the Judge to fail to instruct the jury on the defense theory of the case.

CONCLUSION

FOR THE FOREGOING REASON, THE
JUDGMENT BELOW SHOULD BE RE-
VERSED AND APPELLANT SHOULD
BE GRANTED A NEW TRIAL.

Respectfully submitted,

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

WILLIAM EPSTEIN
Of Counsel

November 22, 1974

Certificate of Service

Nov 25, 1974

I certify that a copy of this brief and appendix
has been mailed to the United States Attorney for the
Eastern District of New York.

William E. Carter